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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 102

THE JAMES BLACKSTONE MEMORIAL LIBRARY ASSOCIATION, *et al.*,

Petitioners,

v.

GULF, MOBILE AND OHIO RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Respondent's brief requires only a short reply.

Respondent makes no defense of the extraordinary statement of the Court of Appeals that plaintiffs had abandoned the claim of damage from continued stoppage of Joliet dividends, when merely that part of their argument below on this point quoted in their petition herein (pp. 32-37) covers over five pages. Gulf merely asserts that the Court of Appeals "discussed the point" (after its supposed abandonment), but actually it did not do so.

Gulf states (p. 25) that "the price had not been depressed by the existence of the tax controversy," (meaning, we presume, the improper stoppage of divi-

dends). Such an assertion is contrary to all experience, and illustrates Gulf's constant efforts to escape from the facts.

Gulf many times (pp. 8, 9, 11, 12, 17, 18, 20) reiterates the absurd contention that because the former Joliet property was sold for less than book value (which was based on cost thirty or more years before Gulf acquired its interest in 1947), the sale was unprofitable to Gulf. On the contrary, the fact was that the high book value (and consequent high tax cost) of the Joliet realty was one of the important elements of value of the minority stock, for the only way in which Gulf could take advantage of this high cost, thus making a large tax saving through a pure technicality, when in fact it was getting four million dollars more (tax-free) from the Government than it could from any one else, was by dissolving the Joliet before consummating the sale. And it is plaintiffs' irrefutable statements regarding this tax windfall that Gulf principally objects to as unjustified.

Gulf correctly states (p. 13) that Mr. Gardner calculated the maximum value to Gulf of Joliet stock as $260.-plus. But far from proving that he was "in possession of all the material facts," this proves just the reverse. Obviously, Mr. Gardner did not know that Gulf had decided it could afford to pay $259. a share, or he would have asked at least for that price. And, what was much more important, he knew nothing whatever of the pending Post Office sale, or the hidden tax windfall.

Gulf states (p. 24) that "A Master in Chancery, a District Court Judge and three judges of the Court

of Appeals have unanimously agreed that there is no factual basis for Petitioner's charges." In fact, the Master and the District Court found that there was no conflict in the evidence (except as to the fair value of Joliet shares in 1950). The Court of Appeals found the evidence "not free from conflict," but concluded that "it furnishes ample support for the findings made by the special master," beginning with the finding that "Prior to February 10, 1950, GM & O had no knowledge or information that the government was giving Harrison Street property consideration more favorable" than other Chicago sites. The Court of Appeals thus did not agree with the finding below of no conflict, but though the findings below depended solely on undisputed facts, documents and depositions, the Court of Appeals did not review these independently, as we submit it should have, but instead was satisfied with supposed "ample support" for the findings below,—a criterion not properly applicable here.

Even on the basis of this erroneous criterion, it seems that the Court below should have found the District Court's decision clearly erroneous. And if it had undertaken an independent review, it could not conceivably have reached the conclusion quoted in the preceding paragraph, in the face of the following undisputed circumstances: the sudden decision to abandon the elaborate appeal then about to be argued on the tax question; the simultaneous dispatch of an important executive from Mobile to New York to buy plaintiffs' stock in apparent violation of the I. C. C. order; the otherwise unexplained pause in the Government negotiations until the last share of Joliet was bought; the frantic haste to dissolve Joliet (the I. C. C.

application alleging total stock acquisition being actually executed three days before the fact); and finally the completely damning admission in Gulf's own directors' minutes that Gulf had hoped to consummate the proposed sale to the Government by June, 1950, but now was authorizing temporary financing till June, 1951.

In its briefs below, Gulf offered a series of explanations, which grew more fantastic with each attempt, of the crystal-clear minutes. Before this Court, it has given up the task. Though the burden of explanation was of course on Gulf as the fiduciary, it offered no evidence whatever on this subject.

In footnote 1, page 8, Gulf impliedly criticizes the conduct of plaintiffs' counsel in an entirely different litigation. Since Gulf introduced this extraneous matter, we call this Court's attention to the dissenting opinion of Presiding Justice Peck and Justice Callahan in *Slater* v. *Gulf, et al.*, 279 A. D. 166, 172, stating that "the letter of May 25, 1956, appears on its face to be a contract, at least binding the Defendants to a good faith effort to carry it out." Gulf escaped liability there by a tricky technicality, and the fact that it refers to that case with apparent pride is a good indication of its ethical standards.

In a footnote to page 5, Gulf charges that it is misleading to quote the opinion below as stating that "for some reason not discernible * * * dividend payments were stopped," and denies (p. 26) that there is any evidence that Gulf's " 'long-range plan' for Joliet had been to starve the minority into submission by an indefinite suspension of dividend payments." On the contrary, plaintiffs' statements are supported

by Judge Igoe's findings, approved by the Master, quoted at pages 7 and 8 of their Petition. And if as the Master found "the possibility of" Judge Igoe's decision's "being set aside on appeal was practically non-existent" (111, A. 146), it was improper for Gulf to continue the litigation. On the other hand, if Gulf's appeal had any chance of success, the sudden decision to abandon it in February, 1950, after spending so much effort to perfect it, emphasizes Gulf's urgent need then to acquire 100% Joliet stock ownership at all costs, in view of the pending Government deal.

Gulf attempts (p. 21) to explain away the Court of Appeals' evident reliance on Illinois law by quoting the opening words of a paragraph in petitioners' brief below, which in the interests of accuracy we quote in full, italicizing the omitted portion: "It is not believed that there is any substantial difference between present Illinois law and Federal law on this subject, *but as the plaintiffs are suing under both, and are entitled to any additional benefits conferred by Federal Law, and as the Federal decisions, covering the entire country since the enactment of the relevant statutes beginning in 1933, are naturally much more numerous, we limit our citations largely to Federal decisions. As the Third Circuit Court of Appeals said in Zahn* v. *Transamerica Corp.*, 162 F. 2d 36, 44: '*The trend of the Federal decisions is unmistakable.*'"

There was no apparent purpose for the Court of Appeals to analyze so carefully the old Illinois decisions as to "assured sale," unless it believed that Illinois law governed the standard of duty owed by majority stockholders under the Federal statute. The Court of Appeals actually found (page 7 of its opin-

ion) that Gulf "was anxious" (as it had been for several years)[1], to sell the Harrison Street property, and that it had hopes, perhaps with some reason, of "consummating a sale to the government." This is only a pale reflection of the admission in Gulf's own minutes that it had hoped at some time before April 14, 1950 (beyond doubt before realizing the necessity of buying all Joliet's stock first) *to complete the sale before the summer*, and was still confident of completing it in the following year, as it did. But even so, we submit that under the Federal rule, such a reasonable hope of making such a remarkably profitable sale should have been disclosed by the fiduciary. Surely if a large oil company started drilling on the beneficiary's land, the duty of disclosure would exist even if there was no assurance of finding oil. But the Court of Appeals regarded its finding as of no help to plaintiffs, for as it went on to show (under an erroneous interpretation, we submit, of the Illinois law) only an "assured sale" need be revealed in Illinois. Of course, the Court of Appeals did not overlook plaintiffs' alternative claim under the Federal statute, but it construed the statute not as creating a new and nationwide standard of fiduciary obligations toward minorities, but merely as adopting the standard previously applied in each State, respectively.

Gulf also (p. 22) would treat as mere dicta the repeated statement in the opinion below that the Joliet lease was really a conveyance in fee, and hence Gulf finds no conflict with the Alton Plan of Reorganization, which specifically confirmed that the lease was not a conveyance. This is an extraordinary conten-

[1] The clause which we have bracketed was an obvious misconception, as Gulf evidently concedes. See our Petition, p. 37.

tion, since the Court of Appeals evidently regarded its view that the lease was a conveyance as a fundamental basis of its decision. The Court will observe, contrary to Gulf's present claim that there was really no difference between a lease and a conveyance, that since it was necessary to convey a fee title to the Government, a *lessor* would necessarily have to execute the deed, which a former grantor would not. Also, capital gain or loss would accrue to a *lessor*. And the stockholders of a *lessor*, whose consent was necessary to the sale of the fee, would naturally be entitled to bargain for a fair share of any profitable dealings with the fee.

The Court of Appeals evidently thought that the above incidents of a landlord's ownership under a lease would not attach to the Joliet, because it did not own its property any longer, and its stockholders had nothing but a contractual right to $7. a share annually. It was so impressed with this aspect of the case that it paid no attention to the analogous case of the *New York & Harlem R. R. Co.*, whose stockholders are limited to $5. a share annually, but whose stock has ranged in market value on the New York Stock Exchange from $300. to $600. per share. Of course, this is on the basis not of its yield, but of the value of its property. The New York & Harlem situation is part of the record in this case, unlike the leased lines referred to in Gulf's brief (footnote, p. 23; *Friedman* v. *United States*, 168 F. Supp. 815, 359 U. S. 205). There, the forced merger of the leased lines by the I. C. C. was upheld because the leases (unlike the Joliet's) gave no rights to the lessors' stockholders individuality. This confirms the "disability" that Mr. Hicks knew of, but did not dis-

close to the plaintiffs—that Joliet could not be dissolved without the unanimous consent of its stockholders. Furthermore, there was no evidence in that case of any special strategic value of any of the lessors' holdings, or of any tax advantage, and *a fortiori* no concealment of such elements of value by an acquisitive fiduciary.

We believe, on the basis of Gulf's own actions, the undisputed surrounding circumstances, the contemporary documents, and Gulf's admissions, that not only was the decision below clearly erroneous, and unjust to the numerous plaintiffs in this action, but also that the issues involved are of sufficient general interest and importance to justify the granting of the writ of certiorari applied for, for the reasons specified in the Petition.

Respectfully submitted,

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